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In The

Supreme Court of the United States

October Term, 1979

No. 79-1779

State of Iowa, State Conservation Commission of the State of Iowa,

Petitioners,

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin, R.G.P. Incorporated, Darrell L., Harold, Harold M. and Luea Sorensen, Harold Jackson, Otis Peterson and Travelers Insurance Company,

Respondents (Petitioners on Separate Petitions),

vs.

Omaha Indian Tribe and United States of America,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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State of Iowa, State Conservation Commission of the State of Iowa,

Petitioners,

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin, R.G.P. Incorporated, Darrell L., Harold, Harold M. and Luea Sorensen, Harold Jackson, Otis Peterson and Travelers Insurance Company,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

Petitioners State of Iowa and State Conservation Commission of the State of Iowa respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit rendered on remand from this Court on January 15, 1980.

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OPINIONS BELOW AND OF THIS COURT

The memorandum opinion and the findings of fact and conclusions of law of the District Court for the Northern District of Iowa are reported in *United States*

v. Wilson, 433 F. Supp. 57 and 433 F. Supp. 67 respectively and are reproduced in Appendix B (findings at page 1 and conclusions at p. 51) (hereinafter "App. B") and Appendix C (memorandum opinion) (hereinafter "App. C") to the previous petition for certiorari filed in this case by Wilson et al. (No. 78-160). The opinion of the Court of Appeals for the Eighth Circuit on appeal is reported as *Omaha Indian Tribe v. Wilson,* 575 F. 2d 620 (8 Cir. 1978), and is reproduced as Appendix A (hereinafter "App. A") to the previous petition for certiorari.

The opinion of this Court, dated June 20, 1979, upon certiorari to the Eighth Circuit, is reported as *Wilson v. Omaha Indian Tribe,* 442 U. S. 653, 99 S. Ct. 2529, 61 L. Ed. 2d 153 (1979), and is reproduced at page 2 of the appendix separately presented to this Court with the petition for certiorari of Petitioners Wilson et al, which appendix is hereby adopted as the appendix to this petition. The opinion of the Court of Appeals for the Eighth Circuit, on remand from this Court, is reported as *Omaha Indian Tribe v. Wilson,* 614 F. 2d 1153 (8 Cir. 1980) and is reproduced at page 31 of the appendix.

JURISDICTION

The Court of Appeals for the Eighth Circuit entered its judgment on remand on January 15, 1980. A timely petition for rehearing *en banc* was denied on February 8, 1980. This petition for certiorari is being filed within ninety days of that date. This Court has jurisdiction under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Court of Appeals is inconsistent with the mandate of this Court in *Wilson v. Omaha Indian Tribe,* 442 U. S. 653 (1979), that the governing rule of decision in this case is Nebraska law.

2. Whether the Court of Appeals erred in determining that Nebraska's common law rules of property differ from those pronounced by the Nebraska Supreme Court.

This question includes the following specific questions:

(a) Whether a federal court may, when determining state property law, reject state court precedent defining accretion and avulsion not because of subsequent events providing persuasive evidence that the state court would modify its decision but because all parties there seeking to quiet title claimed ownership by accretion.

(b) Whether a federal court may predict a change in state law without stating reasons for finding subsequent clear and persuasive indication that earlier pronouncements would be modified by the state's highest court.

(c) Whether a federal court may exercise its independent judgment on a question of state property law without first finding that there are no relevant state policies or state methodologies to guide the court in predicting the result in the state's highest court.

(d) Whether a federal court may predict that a state court would significantly alter vested property rights

and require additional elements of proof to establish such property rights.

(e) Whether a federal court may predict that a state court will rely on certain federal decisions to develop common law principles contrary to decisions of the United States Supreme Court.

3. Whether the Court of Appeals relied on an erroneous view of the federal and common law of accretion and avulsion as the basis for determining Nebraska law.

4. Whether the Court of Appeals erred in giving Petitioners inadequate opportunity to present their views on remand from this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution of the United States provides, in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

The State of Iowa and the State Conservation Commission seek review of a decision of the Eighth Circuit Court of Appeals issued on remand from this Court. This decision again reversed a judgment of the District Court quieting title in the State and other defendants to 2900

acres of Iowa land claimed by the Omaha Indian Tribe and the United States as Trustee for the Tribe. The Court of Appeals panel concluded that the District Court had erroneously determined the Nebraska law defining accretion and avulsion.

The Tribe claims title to some 6000 acres on the Iowa side of the Missouri River in the Blackbird Bend area and about 5000 additional acres on other bends to the north of Blackbird Bend on the theory that such land was cut off from the reservation by avulsive movements of the river from 1875 on. The Tribe also seeks damages of $50,000,000 for trespass (App. B 7-8). The complaints of the Tribe and the United States invoked the jurisdiction of the District Court under 28 U. S. C. §§ 1331, 1345, and 1362. The issues relating to ownership of this 2900-acre tract of land within the 1867 Barrett Survey were separated for trial.[1] The other claims remain to be tried after resolution of this action.

The Tribe had not been in possession of this land since at least 1912 (App. B 48). By summary judgment defendants were precluded from raising affirmative defenses such as adverse possession or statutes of limitations (App. B 9). The Tribe seized possession of the land in 1975 and has been allowed to remain in possession pending the outcome of the suit (App. B 4-5).

The Tribe basically claims that whenever the river moved away from the reservation toward the easterly

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[1]The Barrett Survey line is not the original location of the river boundary established by the Treaty of 1854 since the river moved eastward between 1854 and 1867. (App. B 8)

and northerly high banks it moved by erosion, thus causing the Tribe to gain as accretion approximately 8000 acres, but that whenever the river moved to the west or south, it did so by jumping from one channel to another (App. B 42). The Tribe claimed that these alleged "jumps" of the channel were avulsions which do not affect boundaries.

After 21 days of trial, the District Court, applying Nebraska law, quieted title in the defendants. The District Court not only found no substantial evidence of identifiable land to support the claimed avulsions (App. B 49-50) but also found that defendants had proved by a preponderance of the evidence that the lands formerly in the Barrett Survey had washed away during the critical periods and that sediment was deposited as accretion to the Iowa shore (App. B 52-53).

On appeal the Eighth Circuit Court of Appeals determined that federal law should apply and concluded that under federal law the sudden shift of a channel over submerged lan in the river bed constituted an avulsion even though the land was not identifiable after the change. The Court of Appeals also determined that 25 U. S. C. § 194 imposed the burden of proof on all the defendants as "white persons" in a quiet title dispute with an Indian Tribe. The Court of Appeals concluded that the Iowa landowners had failed to meet this burden of proof given the broader definition of avulsion under federal law (App. A 65).

This Court granted certiorari and, noting serious disagreement with the Court of Appeals, vacated its judgment on two grounds. First, this Court held that the

federal court should borrow Nebraska law to protect the significant local interests involved. Second, this Court determined that, although 25 U. S. C. § 194 imposed the burden of persuasion on the individual Iowa claimants, it was inapplicable to the State of Iowa. The cause was remanded to the Court of Appeals to determine whether the District Court correctly interpreted Nebraska law and whether the District Court had properly applied that law to the facts (App. 28).

Following remand, the Court of Appeals limited all supplemental briefs to ten pages, required that all briefs be simultaneously filed, and expressly precluded the filing of responsive briefs. The Defendants' motion for additional briefing and argument was overruled.

The Court of Appeals concluded that Nebraska law follows the principles perceived by it in its first opinion (App. 36) and held that the District Court erred in concluding that a sudden movement of a channel without evidence of identifiable land in place was accretive (App. 42). The Court rejected the contrary holding in *Conkey v. Knudsen,* 143 Neb. 5, 8 N. W. 2d 588 (1943), relied on by the District Court, by explaining ". . . the decision does not, we feel, represent a departure from the basic common law definitions. It may be better explained by the fact that no party pleaded avulsion. . . ." (App. 42, n. 7).

> The Nebraska cases indicate Nebraska follows the basic common law principle: avulsion occurs when there is a sudden and rapid change of the channel, within or without the bed of a stream, whether or not intervening land is submerged during a sudden flood.

(App. 41). The Court of Appeals also held that Nebraska law requires for accretion affirmative proof that the land between the old and new channels "be completely disintegrated" and that the deposit of soil be gradual and imperceptible (App. 39).

Even if the District Court's view of Nebraska law were applied, the Court of Appeals held that the individual landowners failed to meet the burden of proof imposed by 25 U. S. C. § 194 since there was evidence the land in question "could be" the same land described by Barrett in 1867. The Court recognized that the evidence of avulsive change "does not equally balance defendants' proof, but rather points to the speculative and conjectural nature of *any* conclusions drawn from the evidence." (App. 46-47). The Court quieted title in the Tribe as against the individual Iowa titleholders.

The Court decided that, since the State of Iowa was not subject to the burden of proof imposed by 25 U. S. C. § 194, its case was remanded to the District Court to allow the Tribe an opportunity to point out the evidence it relied upon to show avulsion on the land claimed by the State (App. 47-48).

Petitioners and the other Iowa landowners filed petitions for rehearing *en banc,* all of which were denied.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals on remand is inconsistent with the mandate of this court in Wilson v. Omaha Indian Tribe, 442 U. S. 653 (1979).

The decision of the Court of Appeals is inconsistent with the mandate of this Court in *Wilson v. Omaha Indian Tribe* (App. 19-24) that state property law should provide the governing principles in this case. The Court of Appeals used the same method of analysis rejected by this Court in *Wilson;* it assumed that "basic common law principles" should be followed. The Court ignored contrary precedent, the stated policies, and the judicial methodology of Nebraska in defining that state's property law. The result was that it used the same federal cases to reach the same result as in its previous decision reversed by this Court.

If the Court of Appeals is free to redefine state property law, this Court's decision in *Wilson* becomes an empty gesture. The failure to follow state law defeats the states' significant interest in application of their real property law as surely as does application of federal law; such failure also defeats the states' interest in preserving the authority of state courts to finally determine state law and also unsettles the laws of the states.

This Court has plenary power to review the decisions of lower courts to determine whether such are consistent with its mandate. *See, Cascade Natural Gas Corporation v. El Paso Natural Gas Co.,* 386 U. S. 129 (1967); *Continental Insurance Co. v. United States,* 259 U. S. 156, 166 (1922). That power should be exercised in this case.

II. The Court of Appeals' construction of federal law as a source of state law is inconsistent with decisions of this court and of the Ninth Circuit.

In its first decision, the Court of Appeals held that the federal common law of accretion and avulsion was broader than the Nebraska law applied by the District Court. The Court primarily relied on two federal decisions involving interstate boundaries, *Veatch v. White,* 23 F. 2d 69 (9 Cir. 1927), and *Uhlhorn v. U. S. Gypsum Co.,* 366 F. 2d 211 (8 Cir. 1966), *cert. denied,* 385 U. S. 1026 (1967), in concluding that "the sudden, perceptible change of the channel, whether within or without the river's original bed, is a critical factor in defining an avulsion." (App. A 38). This Court denied certiorari on the question whether the Court of Appeals had erroneously determined federal law but reversed the Court of Appeals by holding that Nebraska property law should be borrowed as the rule of decision. On remand, the Court of Appeals adopted the view that Nebraska law was identical to the federal rule previously pronounced[2] (App. 36).

The basic analysis used by the Court of Appeals on remand was that Nebraska courts had primarily relied on federal cases to ascertain the basic common law principles of accretion and avulsion (App. 36-38). The cases previously used to determine the federal common law are the only holdings cited to establish the "basic common law principles" that a sudden change of channel within a bed is an avulsion even absent identifiable land (App. 42-43, n. 8; App. A 32-34). The Court of Appeals'

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[2]The Government's theory in the original appeal was that this "thalweg rule" applied to sovereign boundaries and differed from either avulsion or the island rule. (Brief on Appeal to Eighth Circuit Court of Appeals, p. 9)

construction of Nebraska law is based on a view of federal law which is contrary to the prior pronouncements of this Court and is therefore unlikely to be followed by the Nebraska Supreme Court.

The Court of Appeals rejected the District Court's conclusion that avulsion occurs only when a sudden shift in the river channel cuts off land "so that after the shift it remains identifiable as land which existed before the change of the channel and which never became a part of the river bed" (App. B 14). Instead, the Court of Appeals held that the avulsion rule encompassed broader parameters and principally decided that avulsion could occur within the bed of a river without any identifiable land remaining in place, thereby eliminating the only clear criteria of avulsion—that it be visible, perceptible, and arise from a known cause.

The expansion of the avulsion rule in this manner was expressly rejected by this Court in *Louisiana v. Mississippi* as the Report of the Special Master, affirmed in all particulars by this Court, 384 U. S. 24 (1966), states at page 20:

> . . . we have been unable to find any case, with facts similar to the instant case, in which an avulsion has been found by the Court where the river remains in the same bed of the stream. In all such cases the new channel was formed when the river "suddenly leaves its old bed and forms a new one. . . ." Arkansas v. Tennessee, 246 U. S. 158, 173. Unless suddenness and perceptibility are not then clearly established, the general rule [accretion] must be applied.

The Court of Appeals' decision that avulsion requires only the showing of a sudden change in the river

channel (App. 41) was rejected by this Court in *Nebraska v. Iowa,* 143 U. S. 359 (1892), which has been consistently followed by Nebraska courts. This Court there held that the rapidity of change on the Missouri River did not affect the applicability of the principle of accretion. 143 U. S. at 368-369. In discussing why, the Court emphasized that such changes did not leave identifiable land in place:

> Notwithstanding this, two things must be borne in mind . . . that, while there may be an instantaneous and obvious dropping into the river of quite a portion of its banks, such portion is not carried down the stream as a solid and compact mass, but disintegrates and separates into particles of earth borne onward by the flowing water, and giving to the stream that color which, in the history of the country, has made it known as the "muddy" Missouri; and, also, that while the disappearance, by reason of this process, of a mass of bank may be sudden and obvious, there is no transfer of such a solid body of earth to the opposite shore, or anything like an instantaneous and visible creation of a bank on that shore.

143 U. S. at 369. The definition of avulsion provided by *Nebraska v. Iowa* also emphasizes identifiable land:

> . . . in the very uncommon case called avulsion, when the violence of the stream separates a considerable part from one piece of land and joins it to another, but in such manner that it can still be identified, the property of the soil so removed naturally continues vested in its former owner.

143 U. S. at 366 (quoting Vattel).

The Court of Appeals' decision totally ignores the geological characteristics and history of movement of the Missouri River which were of great importance to this

Court in *Nebraska v. Iowa* and in essence makes avulsion the controlling rule on navigable rivers rather than an exception to the general rule of accretion. Its conclusion that persons claiming accretion must affirmatively prove that sedimentation is gradual ignores this Court's finding in *Nebraska v. Iowa* 143 U.S. at 369, that, on the Missouri River, "There is, no matter how rapid the process of subtraction or addition, no detachment of earth from one side and deposit of the same upon other."

The Eighth Circuit's definition of avulsion conflicts in principle with the position of the Ninth Circuit Court of Appeals. This conflict is most clearly shown by *Peterson v. Morton*, 465 F. Supp. 986 (D. Nev. 1979), applying *Beaver v. United States,* 350 F. 2d 4, 6-7, 10-12 (9 Cir. 1965), which emphasizes the importance of identifiable land. In *Peterson,* the United States claimed as accretion land which had been submerged. 465 F. Supp. at 988. The Court found that the Colorado River had annually and repeatedly cut new channels within the bed, 465 F. Supp. at 992, but held, "This Court excludes as not significant any and all avulsive movements of the river that may have occurred within the river's modern ordinary high water marks, that is, within the bed of the river itself." 465 F. Supp. at 995. The *Peterson* case not only reveals that the Court of Appeals' views are not settled "basic common law principles", but it also graphically illustrates the practical difficulty of these views. Within the bends of many rivers, like the Colorado or the Missouri, there may have been frequent sudden shifts of channel, combined with many slower movements of the channel. Deletion of the traditional criteria of avulsion (identifiable land, perceptible change, seeking of a

new bed) would make the determination of river boundaries almost impossible.[3]

III. The Court of Appeals decided the Nebraska law of accretion and avulsion, which involve important state questions, in conflict with Nebraska law.

IV. The method used by the Court of Appeals to predict Nebraska law violates the authority of state courts and is inconsistent with decisions of this court and other circuit courts.

The Court of Appeals wrongly rejected binding state precedent when it refused to follow *Conkey v. Knudsen*, 143 Neb. 5, 8 N. W. 2d 538 (1943), vacating 141 Neb. 517, 4 N. W. 2d 290 (1942), although the Court of Appeals recognized this case "held movement which occurred during a single high water period caused by an ice jam was accretive . . ." (App. 42, n. 7). *Conkey II* is squarely contrary since it held that a sudden one-mile movement of the Missouri River channel, absent proof of identifiable land in place, was accretive and not avulsive. Although one seeking to quiet title must prove the strength of his own title, the Court of Appeals refused to apply this Nebraska Supreme Court holding on point, stating:

> . . . the decision does not, we feel, represent a departure from the basic common law definitions. It may be better explained by the fact that no party pleaded avulsion, as none had title to the land in question if the old channel remained as the boundary.

(App. 42, n. 7).

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[3]The Court of Appeals' conclusion in this case that all of the evidence presented at trial (expert and lay testimony and almost 500 exhibits) was speculative and conjectural graphically illustrates the difficulties created by broadening the traditional definition of avulsion. (App. 45-46)

The Court of Appeals totally ignored other contrary Nebraska cases relied upon by the District Court and cited by Petitioners, such as *Wiltse v. Bolton,* 132 Neb. 354, 272 N. W. 197 (1937), which held ". . . the action of the river in the spring of 1908 was not an avulsion, but the shifting of the main channel from the east to the west side of the river bed . . ." Although the Court recognized that Nebraska cases emphasize identifiable land in place in defining avulsion, the Court of Appeals determined that identifiable land was not a necessary element of avulsion under Nebraska law (App. 42-43, n. 8; App. A 31, n. 30).

The ultimate authority of state courts on questions of state law prevents federal courts from questioning the bases of their decisions.[4] *Mullaney v. Wilbur,* 421 U. S. 684, 691-692 (1975); *Moore v. Illinois Central Railroad Co.,* 312 U. S. 630, 633 (1941). Federal courts may refuse to apply state precedent only where *subsequent* state decisions or legislative action provide clear and persuasive evidence that the state itself is changing its view. *Bernhardt v. Polygraphic Company of America,* 350 U. S. 198, 204-205 (1956); *Nolan v. Transocean Air Lines,* 365 U. S. 293 (1961); *West v. American Tel. & Tel. Co.,* 311 U. S. 223, 236 (1940).

Although other Circuit cases have held that a state supreme court decision need not be expressly overruled to lose its binding authority as defining state law, those holdings are based on findings of persuasive intrastate evidence that the state court is prepared to reconsider

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[4]Nor is a federal court free to reject considered dictum of state courts. *Hawks v. Hamill,* 288 U. S. 52, 59 (1933).

the question. Such cases examine the law of other jurisdictions to find evidence of a subsequent significant trend in the law. *See, e.g., Mason v. American Emery Wheel Works,* 241 F. 2d 906 (1 Cir. 1957) (predicting overruling of 1928 Mississippi Supreme Court decision that a manufacturer owed no duty absent privity of contract). This prediction method respects the dual sovereignty of state and federal courts by requiring persuasive evidence of subsequent change from intrastate sources while still allowing federal courts to avoid blind adherence to ancient, subsequently discredited precedent. *See, Ideal Structures Corp. v. Levine Huntsville Develop. Corp.,* 396 F. 2d 917, 921-924 (5 Cir. 1968).

In explaining away *Conkey v. Knudsen* as merely an explainable departure from basic common law principles, the Court of Appeals has implicitly held that it may weigh the degree of authority to be given to a state supreme court decision. This is contrary to *Mullaney v. Wilbur,* 421 U. S. 684, 690-691 (1975), in which this Court felt itself bound by a Maine Supreme Court decision despite the argument that the state law determination was a mere subterfuge to avoid federal constitutional issues.

Almost all of the "submerged land" cases relied upon by the Court of Appeals to establish that identifiable land in place is not required for avulsion were decided prior to *Conkey II* (1942) and *Wiltse v. Bolton* (1937) (App. A 32-33, n. 32, incorporated at App. 42-43, n. 8). Only *Uhlhorn v. United States Gypsum Co.,* 366 F. 2d 211 (8 Cir. 1966), *cert. denied,* 385 U.S. 1026 (1967), was decided after *Conkey II,* and *Uhlhorn* specifically found that the submerged land was identifiable. 366 F. 2d at 219-

220. The Court of Appeals could not properly use extrastate sources to predict a change where there is not an overwhelming trend in the law in that direction. Compare *Ideal Structures, supra,* 396 F. 2d at 924, with *Putnam v. Erie City Manufacturing Company,* 338 F. 2d 911, 919 (5 Cir. 1964). No such trend supports the predictions of Nebraska law made by the Court of Appeals. *Louisiana v. Mississippi* and *Peterson v. Morton,* discussed at pp. 11-14, *supra,* graphically illustrate that the concept that avulsion can occur within the river bed is not a "basic common law principle."

There are no subsequent indications by the Nebraska courts which call *Conkey II* and *Wiltse* into question. *State v. Ecklund,* 147 Neb. 508, 23 N. W. 2d 782, 789 (1946), the case primarily relied on by the Court of Appeals as showing that avulsion can occur within the river bed (App. 39), is clearly an application of the "island rule"[5] rather than the definition of avulsion. Not only did that case involve land which had "relicted" or become fast land prior to the shift of the main current around intervening Ware Island but also the court cites its definition of the island rule as the basis of decision. If *Ecklund* were not an island rule case, its finding that the boundary remained the same despite the gradual change in channel would mean that suddenness, the primary criterion for avulsion according to the Court of Appeals, was also not required for avulsion.

The Court of Appeals cites *Wiggenhorn v. Kountz,* 23 Neb. 690, 37 N. W. 603 (1888), decided long before *Conkey*

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[5]This "so-called exception to accretion" is described in *Oregon v. Corvallis Sand and Gravel Company,* 429 U. S. 363, 367, n. 2 (1977), and is a different theory than avulsion. *Id.*

II and *Wiltse,* for the proposition that erosion is not sufficient to establish accretion if land is suddenly formed (App. 39-40, n. 5). This case assumed as a matter of fact that traceable land was washed from one end of an island to the other and held that such would constitute an avulsion. *Wiggenhorn* was decided before *Nebraska v. Iowa;* subsequently rapidity of change was expressly denied as the criterion for avulsion in *Bouvier v. Stricklett,* 40 Neb. 792, 59 N. W. 550, 552-554 (1894). Additionally, *Wiggenhorn* held such soil belonged to its original owner only if it had not remained "until it cements and coalesces with the soil of the second owner, in which case the property in the soil will be changed, and no right to reclaim it remains." 37 N. W. at 605. Since the claimed avulsions here occurred from 1875 to 1923, *Wiggenhorn* would preclude recovery by the Tribe today.

The Nebraska court has never, in its many river boundary cases, decided that avulsion can occur within the bed, that avulsion can occur without proof of identifiable land, that an avulsion can occur where sand bars are submerged during a channel change in a sudden flood, or that one claiming accretion must prove that the land be totally destroyed. Nor does any Nebraska case support the Court of Appeals' determination that the District Court could not properly find accretion on the basis of the extensive evidence presented by the Iowa claimants.

These drastic alterations of riparian rights are beyond the power of a federal court even absent contrary binding precedent. It is for state courts, not federal courts, to determine whether to modify rules of property. *See, Oregon v. Corvallis Sand and Gravel Company,*

429 U. S. 363, 378-381 (1977). Even if Nebraska law were uncertain there must be persuasive evidence that the Nebraska court would reach the same result; otherwise, litigants will obtain different results in federal courts than in state courts. *See, Erie R. R. v. Tompkins,* 304 U. S. 64 (1938); *Guaranty Trust Co. v. York,* 326 U. S. 99 (1945).

In case of uncertainty as to Nebraska law, other circuits require the federal court to look to related Nebraska cases which provide state policy preferences, *Becker v. Interstate Properties,* 569 F. 2d 1203, 1205-1206 (3 Cir. 1977), and which illustrate the judicial methodology of the Nebraska Supreme Court. *First National Life Ins. Co. v. Fid. & Dep. Co. of Md.,* 525 F. 2d 966, 968 (5 Cir. 1976). In its first opinion, the Circuit Court concluded that federal interests required application of federal law and then stated:

> When weighed with the significant policy considerations involved, we hold that, under governing principles, the critical determinant of avulsion is a sudden perceptible shift of the channel.

(App. A 38). After this Court determined on appeal that federal interests did not outweigh the interests embodied in state law, the Court of Appeals made no effort to determine the state policies involved.

The Nebraska Supreme Court has held that the riparian right to alluvion is a vested right which rests on natural law principles. *Gill v. Lydick,* 40 Neb. 508, 59 N. W. 104, 105 (1894).

> No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his ter-

> ritory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain.[6]

Frank v. Smith, 138 Neb. 382, 293 N. W. 329, 335 (1940), quoting *New Orleans v. United States,* 35 U. S. (10 Pet.) 662, 717 (1836).

The Circuit Court apparently determined that continued ownership of an area "under the sky" or as defined by metes and bounds outweighs riparian claims to alluvion and access to the river. Nebraska law, to the contrary, prefers riparian rights as shown by its rejection of the doctrine of re-emergence; in Nebraska, ownership of land is lost if it is submerged so that another's land becomes riparian. *Winkle v. Mitera,* 195 Neb. 821, 241 N. W. 2d 329, 332 (1976). Nebraska's preference for riparian ownership as opposed to title prior to submergence militates a contrary result on the issues of state law in this case.

This Court held in *Day & Zimmoner, Inc. v. Challoner,* 423 U. S. 3, 4-5 (1975) (per curiam), that a federal court could not create new exceptions to state conflicts rules:

> . . . A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.

Surely this principle of federal restraint in modifying state conflicts rules should apply equally to state defini-

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[6]In the cause remaining to be tried, plaintiffs seek to gain 8,000 acres by movement of the river as well as to claim this area as land lost. It is unlikely that successors of the Iowa riparian owners could today recover lands gained by the Tribe during those early years. The expansion of the avulsion rule in this case thus results in a windfall to the plaintiffs.

tions of property rights, which are "particularly subject to the principle of stare decisis". *Oregon v. Corvallis Sand and Gravel Co.*, 429 U. S. 363, 381 (1977).

V. This court should exercise its supervisory jurisdiction over lower federal courts to prevent abuse of the authority to decide questions of state law.

The viability of the power of federal courts to predict state law depends upon the use of proper analytical methods which require the federal court to closely follow state law. Otherwise there is great danger that courts may manipulate sources to achieve a desired result. The exercise of unfettered discretion interferes with the legitimate interests of states in developing law suited to their own unique circumstances and increases the danger of unfair results to litigants sued in federal court.

Petitioners believe this decision illustrates the need for this Court to exercise its supervisory jurisdiction over the federal court system and provide guidance as to the circumstances in which a federal court may look beyond state authorities and independently define state property law.

Although the Eighth Circuit has stated that a federal court must apply the rule the state court would apply even if no controlling state precedent exists, *Soo Line R. Co. v. Fruehauf Corp.*, 547 F. 2d 1365, 1373 (8 Cir. 1977), the opinion in this case apparently follows those cases which have held that, absent "binding precedent" or "controlling state court decisions", it may be guided by that view of the law which in its opinion "provides the most just and reasoned analysis". *Garrard v. Larsen,* 517 F. 2d 1127, 1132 (8 Cir. 1975); *Passwaters v. General Motors*

Corp., 454 F. 2d 1270 (8 Cir. 1972); *Holcomb Const. Co., Inc. v. Armstrong,* 590 F. 2d 811, 813 (9 Cir. 1979). If a federal court may also look behind state decisions to reject them as "binding precedent", it has almost unlimited discretion to independently decide issues of state law.

The failure to articulate and follow state authority on questions of state law appears to be widespread. One study of all appellate diversity opinions published during 1972 concluded that twenty-three percent of all decisions failed to properly articulate the state law basis for decision. Thomas, *The Erosion of Erie in the Federal Courts: Is State Law Losing Ground?,* 1977 Brigham Young U. L. Rev. 1, 13 (1977). *See also,* Note, *Federal Interpretation of State Law—An Argument for Expanded Scope of Inquiry,* 53 Minn. L. Rev. 806, 819-820 (1969) (study of Eighth Circuit); Note, *The Ascertainment of State Law in a Federal Diversity Case,* 40 Ind. L. J. 541, 555-560 (1965).

The usual grounds for deference to lower courts' determinations of state law are not present. The underlying source of law is federal or common law. *See, Carroll v. United States,* 354 U. S. 394, 414, n. 34 (1957). The District Judge reached a contrary result by relying on Nebraska cases never distinguished by the Court of Appeals panel. Furthermore, petitioners were never given an adequate opportunity to respond to the novel construction of Nebraska cases asserted by the United States on remand.

The recognition by this Court in *Bernhardt v. Polygraphic Company of America,* 350 U. S. 198, 204-205 (1956), that federal courts have the ability to predict

changes in state law does not justify allowing federal courts to substitute their view of the common law for state court precedent defining that state's property law. The state law issues are of national significance since many states have relied on *Nebraska v. Iowa, supra.* The questions presented raise a number of interrelated issues concerning the permissibility of the method of analysis used by the Eighth Circuit panel to redefine Nebraska property law. Since this Court does not have the resources nor desire to engage in case-by-case analysis of federal courts' determination of state law, it is important for this Court to establish parameters to limit the vast discretion federal courts exercise on state law questions. This case is an appropriate vehicle for establishing such parameters since grounds for deference do not exist, the underlying basis for the decision is an erroneous view of federal law with which this Court is familiar, and methodological errors appear on the face of the opinion. Furthermore, review of this case would allow this Court to examine the method of determination of state property law without fettering the ability of federal courts to predict state law in those dynamic areas in which the law is changing in response to changing social conditions.

VI. The decision of the Court of Appeals will have significant adverse effect by unsettling land titles, encouraging forum shopping, and confusing application of the Nebraska-Iowa boundary compact.

Since federal law was the primary source of the principles adopted by the Court of Appeals, courts may regard the case as defining the federal law, especially since the Special Master's Report in *Louisiana v. Mississippi, supra,* is not generally reported. The case undermines

the status quo of riparian ownership as it is more likely, as in this case, that the riparian owner will have used and improved alluvial land than will have the landowner across the river. Comment, *Land Accretion and Avulsion: The Battle of Blackbird Bend,* 56 Neb. L. Rev. 814, 829-830 (1977). The rules adopted will be difficult to apply and will unsettle the law of those states following *Nebraska v. Iowa, supra.* Those claiming avulsion will litigate these issues in federal court wherever possible. By removing objective criteria for perceptibility of avulsion, there remains little guidance for assessing whether a river movement was accretive or avulsive. If identifiable land is not required for avulsion, can one claim ownership by avulsion to small strips of land on the opposing shore, thus defeating the riparian landowner's claim to further accretion as well as to river access? When is intervening land "completely disintegrated" so as to allow a finding of accretion? Such questions will encourage further litigation and appeals.

This decision immediately affects ownership of 2900 acres by the State of Iowa and Iowa landowners who have farmed the lands in question for many years and also substantially prejudices the pending damages claim and the continued ownership of 8000 acres not located within the original bounds of the reservation "under the sky". (The Tribe's claim to some 3,000 acres within the Blackbird Bend area will apparently be based on the very same river movements involved in this case.) Where the deprivation of such significant property interests is based on the conjecture that the river may have suddenly moved west in the bed of the river one hundred years ago, due process surely requires at a minimum that the

parties have had full and complete opportunity to be heard on the questions of law involved and that the decision of the fact finder be accorded substantial weight. These losses are particularly grievous when the Iowa landowners were not only forced to defend difficult factual issues regarding river movements of 100 years ago but were also deprived of their property by laws never before applied to determine such disputes.

The effect of the decision on the State of Iowa transcends its potential loss of wildlife habitat and recreational areas and the loss of its citizens' property. A difficult dilemma is also presented by the State's duty to respect title good in Nebraska on the ceding date to lands ceded by Nebraska under the Nebraska-Iowa Boundary Compact of 1943. *See Nebraska v. Iowa,* 406 U.S. 117 (1972). The Iowa courts do not have the freedom of the Nebraska courts to independently determine Nebraska law nor does Nebraska have a statutory procedure to certify questions of state law. Litigants will assert that Iowa's courts must follow this decision as the most recent statement of Nebraska law.

In conclusion, this case, although it ostensibly involves only a question of state law, raises issues of great significance. Expectations of property ownership throughout the country are adversely affected both by the assertion of federal authority to significantly alter state property law and by the substantive determination which redefines the law developed in reliance on *Nebraska v. Iowa,* 143 U.S. 359 (1892).

———o———

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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No. 79-1779

In The
Supreme Court of the United States
October Term, 1979

STATE OF IOWA, STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

Petitioners,

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, R. G. P. INCORPORATED, HAROLD, DARRELL L., HAROLD M. AND LUEA SORENSON, HAROLD JACKSON, OTIS PETERSON AND TRAVELERS INSURANCE COMPANY,

Respondents (Petitioners on Separate Petitions),

vs.

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA,

Respondents.

REPLY BRIEF

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No. 79-1779

In The

Supreme Court of the United States

October Term, 1979

STATE OF IOWA, STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

Petitioners,

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, R. G. P. INCORPORATED, HAROLD, DARRELL L., HAROLD M. AND LUEA SORENSON, HAROLD JACKSON, OTIS PETERSON AND TRAVELERS INSURANCE COMPANY,

Respondents (Petitioners on Separate Petitions),

vs.

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA,

Respondents.

REPLY BRIEF

SUMMARY OF ARGUMENT

In their Briefs in Opposition, the United States and the Omaha Indian Tribe assert that the State of Iowa may not now seek review of the Court of Appeals' determinations of the Nebraska law of accretion and avulsion because the State's case was remanded to District Court. A favorable decision on remand would not render these issues moot because the State will be required to defend the severed portions of this action if the decision below is not

reversed. The issues raised by the State are also properly raised by other Petitioners. These issues should be considered at this time to avoid unnecessary trials and appeals and to insure compliance with the prior mandate of this Court.

The United States now contends that the panel's discussion of federal law as a source of Nebraska's definitions of accretion and avulsion is merely dictum. This view is inconsistent with the prior positions of the United States. The only analytical basis for the panel's determination of state law is the assertion that such reflects common law principles which Nebraska, relying on federal law, would follow. If the Court of Appeals erred in its construction of federal and common law, it had no rational basis for predicting change in Nebraska law.

ARGUMENT

I. The questions presented by the petition of the State of Iowa are significant and should be considered at this time.

The United States and the Tribe assert that the issues raised by the State's petition may become moot because its case was remanded to the District Court. Then, in order to avoid any review of the panel's construction of Nebraska law on remand, the Respondents here claim that the individual landowners are not adversely affected by the state law determination because the panel alternatively held that these landowners failed to meet their burden of

proof even if identifiable land in place were required to establish avulsion under Nebraska law. This analysis fails to recognize both the weaknesses of the panel's alternative holding and its interrelationship with the state law issues raised by the State of Iowa and individual petitioners. Furthermore, review is necessary at this time to avoid the waste of judicial resources required to try the complex proceedings rendered necessary by the panel's decision, to avoid unfairness to the individual Iowa landowners should the State prevail in a later appeal, and to insure compliance with the prior mandate of this Court.

A favorable decision for the State on remand would not render the State's petition moot. The Tribe's claim to 8,000 acres of land as accretion to the Barrett Survey could not proceed absent the Court of Appeals' decision quieting title in the Tribe to the land in the Barrett Survey area. The Tribe's claim for $50,000,000 in damages for trespass must also be tried if the panel's decision is not reversed. Neither the federal courts nor the defendants can afford the expense of additional lengthy trials and further appeals merely to obtain review of legal issues which are squarely presented at this time. *Stainback v. Mo Hock Ke Lok Po,* 336 U. S. 368, 371 (1949).

The extraordinary circumstances of this case warrant review by certiorari "before . . . rendition of judgment or decree" pursuant to the authority granted by 28 U. S. C. § 1254 (1). *See Bolling v. Sharpe,* 347 U. S. 497, 498 (1954). Only review at this time can insure compliance with the prior mandate of this Court to apply state law in order to protect the reasonable expectations of property owners. Review of the State's contentions after remand

or after the second quiet title proceeding could well result in different rules of law being applied to the claims of the State than to those of its co-defendants. The petitions of these co-defendants raise significant issues concerning the construction and constitutionality of 25 U. S. C. § 194. This Court should also grant certiorari to consider the state law issues at this time to avoid further proceedings in this Court.

The Tribe and the United States misconstrue the questions presented by the State and other petitioners by assuming that the only issue of Nebraska law contested is whether an avulsion can occur absent proof of identifiable land in place (Br. of U. S. 7-8; Br. of Omaha Indian Tribe 34-38). Because the alternate holding of the Court of Appeals assumed that identifiable land in place was a sine qua non of avulsion, the Tribe and the Government argue that the state law questions need not be considered. However, the alternate holding must also be affected by the Court of Appeals' erroneous views that one claiming accretion under Nebraska law must prove that sedimentation was gradual and that all land between the old and new channel was totally destroyed, that sandy areas submerged at high water are not part of the bed of a river but may instead be viewed as traceable land, that an avulsion may be found absent any evidence that the change was perceptible as it occurred, and that greater proof than expert testimony and historical and scientific evidence is necessary to prove accretion under Nebraska law.[1] These erroneous views of Nebraska law were not cured by the alternative holding.

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1 Implicit in this Court's prior opinion is the view that 25 U. S. C. § 194 imposed no greater proof than that required to carry the burden of quieting title under Nebraska law (A. 27).

Although neither the United States nor the Tribe cite any Nebraska case supporting these determinations of state law, the United States now asserts that any discussion of federal law below was "mere dictum" (Br. 10, n. 6-7). Yet the Court of Appeals went to great lengths to establish that Nebraska courts followed federal law in this area (A. 36-38). The United States relied at trial and in its appeal to the Eighth Circuit on a "jump" theory or "thalweg rule" by which it asserted that a sovereign boundary would not be affected by a rapid movement of the thalweg even if such movement were not a true avulsion. (Brief of the United States on Appeal 13, n. 7, discussing the primary case on which it relied, *Uhlhorn v. U. S. Gypsum Company*, 366 F. 2d 211, 217 (8 Cir. 1966), cert. den., 385 U. S. 1026.) According to that brief, this "thalweg rule," applicable to sovereign boundaries, differed from the rules otherwise applicable to riparian boundaries avulsion, accretion, or the island rule (pp. 8-13). After this Court's decision that Nebraska law governed, the United States claimed that such a river movement would constitute an avulsion under Nebraska law and asserted that the panel's original discussion of the federal law of accretion and avulsion remained valid as Nebraska law.[2] In support thereof, the United States claimed:

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2 The State and Iowa landowners had no opportunity to respond to these arguments on remand since the Court of Appeals required all briefs to be simultaneously filed, limited all briefs to ten pages, and expressly refused to allow any reply briefs. Order of July 11, 1979. Defendants' motion for additional briefing was overruled.

> The opinions of the Supreme Court of Nebraska setting out the law of accretion and avulsion seek to adopt the common law without alteration, and often rely on federal decisions to obtain the applicable rule of law.

(Supp. Br. of the U. S. on remand 3).

Unless this statement is erroneous, the reliance on federal law by the Court of Appeals cannot be dismissed as "mere dictum." Absent the argument that the Nebraska Supreme Court followed basic common law principles as articulated in federal cases, there is no analytical basis for predicting that the Nebraska Supreme Court would no longer follow *Conkey v. Knudsen,* 143 Neb. 5, 8 N. W. 2d 538 (1943), vacating 141 Neb. 517, 4 N. W. 2d 290 (1942), and *sub silentio, Wiltse v. Bolton,* 132 Neb. 354, 272 N. W. 197 (1937).[3] Remove the reliance on *Veatch v. White,* 23 F. 2d 69 (9 Cir. 1927), and *Uhlhorn, supra,* and there is almost no authority to support the definitions of accretion and avulsion adopted by the Court of Appeals panel.[4]

The United States dismisses the questions presented by the State as merely questions of state law. There are

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3 These Nebraska cases are discussed in the State's petition (pp. 14-18). Examination of the facts in both *Conkey* opinions and in *Wiltse* establish that mere proof of a sudden movement of a river channel in the bed of a river, even though significant and arising from a known cause, does not establish avulsion.

4 The Court cited no Nebraska cases in holding that identifiable land in place is not required for avulsion or that an avulsion could occur within the river bed but instead cited its prior opinion defining federal law (A. 42-43, n. 8).

two significant principles of federal law involved in this appeal—the authority of a federal court to ignore state property law decisions and the federal law of accretion and avulsion cited as the source of Nebraska law. If this Court were to conclude that the appellate court properly refused to follow *Conkey* and *Wiltse,* then it would be necessary to consider whether the Nebraska Supreme Court, relying on *Nebraska v. Iowa,* 143 U. S. 359 (1892), would have adopted the "common law principles" stated by the Court of Appeals. This is both a state and federal question of national significance. The law of accretion and avulsion in many states has developed in reliance on the respected common law authority of this Court. The new construction of that body of law by the Court of Appeals raises significant problems for many states and for property owners throughout the nation. As the District Court noted:

> The government would have us recognize avulsions in a variety of river movements that leave no commonly accepted indicia of an avulsion, particularly land in place and an abandoned channel. Moreover, if the indicia of avulsion are cast aside, then the distinction between accretion and avulsion will become virtually meaningless.

(A. B. 56). Because the United States would also stand to lose accretion lands if its own theory were followed as federal law, *see, e. g., Peterson v. Morton,* 465 F. Supp. 986 (D. Nev. 1979) (appeal pending), it is understandable that it should now contend that the Eighth Circuit's discussion of federal law is "mere dictum."

———o———

CONCLUSION

The decision below clearly erodes the authority of *Nebraska v. Iowa,* 143 U. S. 359 (1892), on which many states including Iowa and Nebraska have relied. Like the sand in the Barrett Survey, the law of accretion and avulsion will be no longer identifiable if the decision of the Court of Appeals is not reversed. It is to correct these errors in the determination of state law and to preserve the long-standing rules of property which protect vested rights of riparian ownership that the State of Iowa requests this Court to issue the writ of certiorari.

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In The

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October Term, 1979

NO. 79-1779

STATE OF IOWA, STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

Petitioners,

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, R. G. P. INCORPORATED, DARREL L., HAROLD M. AND LUEA SORENSON, HAROLD JACKSON, OTIS PETERSON AND TRAVELERS INSURANCE COMPANY,

Respondents (Petitioners on Separate Petitions),

vs.

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA,

Respondents.

BRIEF FOR AMICI CURIAE IN SUPPORT OF THE STATE OF IOWA'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

States of Arkansas, Arizona, Connecticut, Florida, Hawaii, Indiana, Kansas, Louisiana, Michigan, Minnesota Missouri, Nevada, New Mexico, North Dakota, South Dakota, Utah, West Virginia Wisconsin, Wyoming

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In The

Supreme Court of the United States

October Term, 1979

NO. 79-1779

STATE OF IOWA, STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

Petitioners,

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, R. G. P. INCORPORATED, DARREL L., HAROLD M. AND LUEA SORENSON, HAROLD JACKSON, OTIS PETERSON AND TRAVELERS INSURANCE COMPANY,

Respondents (Petitioners on Separate Petitions),

vs.

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA,

Respondents.

BRIEF FOR AMICI CURIAE IN SUPPORT OF THE STATE OF IOWA'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

States of Arkansas, Arizona, Connecticut, Florida, Hawaii, Indiana, Kansas, Louisiana, Michigan, Minnesota Missouri, Nevada, New Mexico, North Dakota, South Dakota, Utah, West Virginia Wisconsin, Wyoming

AUTHORITY TO FILE AMICI CURIAE BRIEF

The States of Arkansas, Arizona, Connecticut, Florida, Hawaii, Indiana, Kansas, Louisiana, Michigan, Minnesota, Missouri, Nevada, New Mexico, North Dakota, South Dakota, Utah, West Virginia, Wisconsin, Wyoming, through their Attorneys General, respectfully submit this joint brief as amici curiae under the authority of Rule

42 (4), United States Supreme Court Rules. It is in support of the petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit filed by the State of Iowa and the State Conservation Commission of the State of Iowa.

———o———

INTEREST OF AMICI CURIAE

The State of Arkansas and the other States joining as *amici curiae* have significant interest in the method of analysis used by federal courts to determine state common law, and especially state property law. This interest of the States in the application of state law was previously recognized by this Court in its prior decision that Nebraska property law should be borrowed as the rule of decision in this case. *Wilson v. Omaha Indian Tribe* (App. 19-24, 28). The perceived failure of the Court of Appeals to follow Nebraska Supreme Court decisions in determining Nebraska property law weakens the authority of state courts as the ultimate arbiters of state law. The States also have significant interest in preserving the traditional and workable criteria for determining the effect of river movement on previously existing boundaries. The decision of the Court of Appeals casts significant doubt on the common law definitions of accretion and avulsion, especially as applied in federal courts. Its conclusion that the sudden shift of channel within a river bed is avulsion creates great difficulties of proof and will encourage claims of avulsion as to lands presently occupied and used by riparian landowners. The States' ownership of river beds

or abandoned river beds under the equal footing doctrine, *see Oregon v. Corvallis Sand and Gravel Co.*, 429 U. S. 363 (1977), and the States' interests as representative of their citizens are adversely affected by this decision as it unsettles the law of riparian ownership. The view of federal law expounded by the Court of Appeals may also affect interstate boundary disputes as well as create uncertainties as to choice of law in private riparian property suits.

The States of Arkansas, Minnesota, Missouri, North Dakota, and South Dakota, located as they are in the Eighth Circuit, are especially affected by the definitions of accretion and avulsion adopted by the Court of Appeals. The preference for avulsion stated by the Court, the deletion of objective criteria for avulsion, and the avoidance of contrary state decisions exhibited in this decision will encourage Indian Tribes and others claiming avulsion and having a basis for federal jurisdiction to resolve such claims in federal court. Considering the fact that both the Mississippi and the Missouri Rivers are in large part located in the Eighth Circuit, the immediate consequence of the Court of Appeals' view of this body of law may be great.

The states of the Eighth Circuit are significantly affected by the methodology used by the Court of Appeals to determine state law. The failure to hew closely to state court decisions not only undermines existing decisions of those state courts but also encourages suit in federal court by those dissatisfied with state law. Such forum-shopping in suits to be governed by state law further undermines the authority of state courts and results

in unfair advantage to the plaintiff who has a ground for federal jurisdiction.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Court of Appeals is inconsistent with the mandate of this Court in *Wilson v. Omaha Indian Tribe,* 442 U. S. 653 (1979), that the governing rule of decision in this case is Nebraska law.

2. Whether the Court of Appeals erred in determining that Nebraska's common law rules of property differ from those pronounced by the Nebraska Supreme Court.

This question includes the following specific questions:

(a) Whether a federal court may, when determining state property law, reject state court precedent defining accretion and avulsion not because of subsequent events providing persuasive evidence that the state court would modify its decision but because all parties there seeking to quiet title claimed ownership by accretion.

(b) Whether a federal court may predict a change in state law without stating reasons for finding subsequent clear and persuasive indication that earlier pronouncements would be modified by the state's highest court.

(c) Whether a federal court may exercise its independent judgment on a question of state property law without first finding that there are no relevant state policies or state methodologies to guide the court in predicting the result in the state's highest court.

(d) Whether a federal court may predict that a state court would significantly alter vested property rights and require additional elements of proof to establish such property rights.

(e) Whether a federal court may predict that a state court will rely on certain federal decisions to develop common law principles contrary to decisions of the United States Supreme Court.

3. Whether the Court of Appeals relied on an erroneous view of the federal law of accretion and avulsion as the basis for determining Nebraska law.

4. Whether the Court of Appeals erred in giving Petitioners inadequate opportunity to present their views on remand from this Court.

SUPPLEMENTARY STATEMENT OF THE CASE

The States appearing as *amici curiae* adopt the statement of the case as set forth in the State of Iowa's petition. *Amici* provide the following summary of that portion of the decision of the Court of Appeals which is material to consideration of the questions presented.

The Court of Appeals, on remand to determine whether the District Court properly determined Nebraska law, determined that Nebraska defined accretion and avulsion according to "basic common law principles". The Court of Appeals rejected identifiable land in place as a necessary element of avulsion, holding instead that the common law definition of avulsion includes "a sudden and rapid change of the channel, within or without the bed of a stream, whether or not intervening land is submerged

during a sudden flood." (App. 41). The Court of Appeals found that the presence of identifiable land in place was relevant only to disprove erosion, an element of accretion (App. 43). For a movement of the Missouri River to be accretive, the Court of Appeals held the river must change by a process of erosion which "completely disintegrates" the land between the old and new channels and the deposit of soil must be gradual (App. 39). Since the land claimed in this case was sand and sediment and would lack identifying features, the Court of Appeals determined that the individual landowners had failed to prove that erosion destroyed the land in question (App. 45).

In reaching its conclusion as to the common law of Nebraska, the Court of Appeals recognized that *Conkey v. Knudsen,* 143 Neb. 5, 8 N. W. 2d 538 (1943) (vacating 141 Neb. 517, 4 N. W. 2d 290 (1942)), held to the contrary that a river movement during a single high water period caused by an ice jam was accretive. Nonetheless, the Court of Appeals explained away that case by the fact that all parties there claimed by accretion (App. 42, n. 7). The Court of Appeals did not consider *Wiltse v. Bolton,* 132 Neb. 354, 272 N. W. 197 (1937), cited by the District Court (App. C 13) and relied upon by the Petitioners, which held that the shifting of the channel from one side of the bed to the other during a single high-water period was not an avulsion. Although the Court of Appeals recognized that many Nebraska cases cite identifiable land in place as an element of avulsion, it determined that the existence of identifiable land was not an element of avulsion in Nebraska (App. 42-43, n. 8; App. A 31, n. 30).

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BRIEF OF THE AMICI CURIAE

REASONS FOR GRANTING THE WRIT

I. The method used by the Court of Appeals to determine state law violates the authority of state courts.

The Court of Appeals exceeded the authority of a federal court to find state law when it rejected a contrary Nebraska decision and ignored other decisions relied upon by the District Court and the parties. While federal courts are often necessarily required to predict whether early state court decisions may no longer be followed because of later indications that the law is in a state of flux, this power to predict state law is limited to those situations in which state law itself provides "clear and persuasive indication" of change. *West v. American Tel. & Tel. Co.*, 311 U. S. 223, 226 (1940); *Bernhardt v. Polygraphic Company of America*, 350 U. S. 198, 204-205 (1946). The reason federal courts may then refuse to apply older precedents is that otherwise the outcome would likely differ from that obtainable in state court; the same principle otherwise requires close adherence to state decisions.

The Court of Appeals did not find clear and persuasive indication in later Nebraska authorities that the decision in *Conkey v. Knudsen*, 143 Neb. 5, 8 N. W. 2d 538 (1943), vacating 141 Neb. 517, 4 N. W. 2d 290 (1942), would be overruled today but instead it chose to explain away the Nebraska Supreme Court decision. Even in a case where it was claimed that the state court's reasoning was a subterfuge to avoid federal law, this Court has refused to look behind the decision of a state court on ques-

tions of state law. *Mullaney v. Wilbur,* 421 U. S. 684, 691 (1975).

The failure of the Court of Appeals to examine all Nebraska authorities cited to it, to make findings whether these cases provide governing state policies and precedent, and to make findings whether subsequent Nebraska authorities provide clear and persuasive indication that *Conkey II* or *Wiltse* would be overruled is itself error. In this case the error clearly is prejudicial both to the parties and to the authority of state courts. This failure to utilize proper methodology for determining state law and the resultant application of the Court's views of the basic common law caused the Court of Appeals to adopt rules of property never before adopted by the Nebraska Supreme Court.

Given the strong interest in stability of land titles and the long history of real property concepts, federal courts must be extremely limited in developing new definitions of property under state law. The Nebraska Supreme Court has defined accretion and avulsion many times without ever adopting the definitions stated to be its law by the Court of Appeals. Twice it has ruled directly contrary to the view expressed by the Court of Appeals. It has emphasized a factor for avulsion, identifiable land in place, which was not applied by the Court of Appeals (App. 42-43). But even if there were uncertainty in Nebraska law, the Court of Appeals erred in not looking to Nebraska's policies in predicting how the Nebraska Supreme Court would resolve the uncertainty. Furthermore, it is contended that the Court of Appeals may not adopt as a matter of state law a new property concept which is supported by neither the strong weight of common law au-

thority nor, where based in part on federal law, the decisions of this Court.

As this Court has frequently noted, "Substantive rules governing the law of real property are particularly subject to the principle of stare decisis. See *United States v. Title Ins. Co.*, 265 U. S. 472, 68 L. Ed. 1110, 44 S. Ct. 621 (1924)." *Oregon v. Corvallis Sand and Gravel Company*, 429 U. S. 363, 381, 50 L. Ed. 2d 550, 565, 97 S. Ct. 582 (1977). Since this case involves no evolving body of law or other factors complicating the determination of state law, it is an appropriate vehicle for this Court to provide guidance to the federal courts on the methodology to be used in determining state property law.

II. The decision of the Court of Appeals unsettles the federal and common law of accretion and avulsion.

The Court of Appeals, as a matter of "basic common law principle", defined avulsion as follows: "avulsion occurs when there is a sudden and rapid change of the channel, within or without the bed of a stream, whether or not intervening land is submerged during a sudden flood." (App. 41).

The preference for avulsion shown by the decision is contrary to the general concept that accretion is the rule and avulsion an uncommon exception. *Nebraska v. Iowa*, 143 U. S. 359 (1892), quoting Vattel. The conclusion that avulsion can occur within the river bed has been rejected by this Court in *Louisiana v. Mississippi*, 384 U. S. 24 (1966), affirming the Report of the Special Master, p. 20. The sudden shift of a channel around sandbars in a river bed lacks the necessary element that avulsion be not only sudden but also perceptible when it takes place. *Philadelphia Company v. Stimson*, 223 U. S. 605, 624 (1912). The

decision leaves open the question whether a rapid change of the channel must be significant to constitute an avulsion. Cf. *Peterson v. Morton,* 465 F. Supp. 986, 995 (D. Nev. 1979) (rapid movements of channel within river would not be regarded as significant avulsions).

Several states in the Eighth Circuit will specifically be adversely affected by the failure of the Court of Appeals to analyze all Nebraska authorities. These states' property laws rely on a predictable definition of accretion and avulsion. In determining identifiable land in place to be an essential element for avulsion, the following cases have relied on *Nebraska v. Iowa,* 143 U. S. 359 (1892), or *Benson v. Morrow,* 61 Mo. 345 (1875): *Yutterman v. Grier,* 112 Ark. 366, 166 S. W. 749, 751 (1914); *Porter v. Arkansas Western Gas Co.,* 252 Ark. 958, 961, 482 S. W. 2d 598 (1972); *McCormack v. Miller,* 239 Mo. 463, 144 S. W. 101, 103 (1912); *Coulthard v. Stevens,* 84 Iowa 241, 50 N. W. 983, 984 (1892). Additionally, as noted in Beck, *The Wandering Missouri River: A Study in Accretion Law,* 43 N. D. L. Rev. 429, 441-442, 466 (1967), almost all of the jurisdictions located along the Missouri River have rejected rapidity of change as the primary element for distinguishing between accretion and avulsion.

The rational for avulsion does not apply where the channel shift occurs within the bed of a river bed nor where no identifiable land is left in place.

> The rationale for the doctrine of avulsion is a need to mitigate the hardship that a shift in title caused by a sudden movement of the river would cause the abutting landowners were the accretion principle to be applied.

Bonelli Cattle Co. v. Arizona, 414 U. S. 313, 327, 38 L. Ed. 2d 526, 539-540, 94 S. Ct. 517 (1973), overruled on other grounds, *Oregon v. Corvallis Sand and Gravel Company,* 429 U. S. 363, 50 L. Ed. 2d 550, 97 S. Ct. 582 (1977). The only hardship caused one losing land below the ordinary high water mark is loss of ownership of an area "under the sky". While such land is within the bed, it has little utility. If not identifiable after the shift, there is no perceptible hardship to the extent required to establish avulsion.

Since the American law has always favored accretion, loss of ownership of an area "under the sky" is insufficient alone to overcome the strong policies favoring accretion. Among these are the value of riparianness, the expectancy of riparian owners to a continuing river boundary, the vested right to future alluvion, and the compensation for other lands lost to the river. *Bonelli, supra,* 414 U. S. at 326, 38 L. Ed. 2d at 539. Allowing avulsion to be found when a channel shifts suddenly within the bed of a river will defeat the doctrine that riparian ownership follows the movement of the river.

CONCLUSION

The petition for certiorari of the State of Iowa raises issues of great significance to the federal judiciary, to the States, and to private riparian landowners throughout the nation. If the discretion of federal courts to determine state common law affecting property ownership is not carefully exercised, the ability of the states to protect reason-

able expectations of property ownership is seriously undermined. The erroneous definitions of accretion and avulsion cited as basic common law principles by the Court of Appeals unsettle federal law and the law of those states which have followed *Nebraska v. Iowa,* 143 U. S. 359 (1892).

The *amici* states respectfully request that the Court grant the petition for certiorari of the State of Iowa and resolve the questions presented so as to preserve the authority of state courts in our system of dual sovereignty.

Respectfully submitted,

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